OCT 8 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 22

MAX LEVINSON, *Petitioner*,

v.

SPECTOR MOTOR SERVICE, A Corporation, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

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SUPPLEMENTAL BRIEF FOR RESPONDENT.

Introductory.

The filing of briefs amicus curiae by the Interstate Commerce Commission and the Solicitor General in this case and the positions taken by them urge upon us the necessity of submitting this supplemental brief. The brief of the Interstate Commerce Commission especially is construed as being helpful to respondents' position, but it also raises additional questions which we respectfully believe warrant our further comment.

I. The Interstate Commerce Commission, in an Unbroken Line of Decisions, Has Consistently Held that Its Safety Jurisdiction Extends to Classes of Employees of Interstate Motor Carriers and Its Interpretation Has Received the Tacit Approval of this Court.

Little can be added to the able argument set forth in the Commission's brief amicus curiae to the effect that its jurisdiction over employees of interstate motor carriers for safety purposes extends to all employees in the classes specified (drivers, drivers' helpers, loaders and mechanics), regardless of the quantum of safety work performed by any individual within one of such classes in any one work week. It should be pointed out, moreover, that the Commission, since the early days of regulation of interstate motor carriers, has consistently indicated that its safety jurisdiction was so applicable.

In *Ex Parte No. MC-2*, 11 M.C.C. 203, decided January 27, 1939, the Commission, on rehearing, said (p. 212):

> At the oral argument, counsel for the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, contended that, while our authority to prescribe maximum hours of service was limited to those employees whose activities affect the safety of operation, we may, when that *class* has been ascertained, consider other factors in determining the maximum hours to be prescribed. . . . (Emphasis supplied)

The excerpt quoted also shows that at a time early in the life of the Fair Labor Standards Act, motor carrier employee organizations also interpreted the jurisdiction of the Commission to apply to classes of employees.

In *Ex Parte No. MC-28*, 13 M.C.C. 481, decided May 9, 1939, the Commission said (p. 483):

> It is clear to us that we have power to prescribe qualifications and maximum hours for drivers and their helpers employed by private carriers of property who are engaged in driving or operating motor vehicles transporting property in interstate and foreign com-

> merce. It may be that the activities of other employees are such that "to promote safety of operation" we have power to prescribe qualifications and maximum hours of service for them. As to what *classes* or *types* of employees, if any, may be included in this category, we do not decide here. (Emphasis supplied)

It is clear that there has been no change in the Commission's interpretation of its safety jurisdiction over employees of interstate motor carriers. Although the earlier decisions of the Commission relating to its safety jurisdiction do not specifically refer to "classes" of employees engaged in work the nature of which affects the safety of operation of motor vehicles in interstate commerce, we think the language used therein leaves no doubt that the Commission has always interpreted its safety jurisdiction to be applicable to classes of employees. See, for example, the Commission's first report in *Ex Parte No. MC-2*, 3 M.C.C. 665, decided Dec. 29, 1937, in which the whole purport of the decision leads to this conclusion.

This court long ago said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. *United States v. Moore*, 95 U. S. 760 (1878).

This has been the settled rule down through the years. Cf. *Great Northern Ry. Co. v. United States*, 315 U. S. 262 (1942). There are no "cogent reasons" why the rule should not be observed insofar as the Commission's consistent and practical interpretation of its safety jurisdiction under Section 204(a) of the Motor Carrier Act is concerned.

In *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, decided May 27, 1940, this Court approved the Commission's interpretation of its safety jurisdiction under Section 204(a) of the Motor Carrier Act and held that such jurisdiction was limited to "those employees whose activities affect the safety of operation" (p. 553). The Com-

mission had theretofore, on several occasions, as shown above, clearly indicated that its safety jurisdiction, to the degree applicable, extended to *classes* of employees. This Court, in the *American Trucking Associations* case, supra, in no way indicated that this was not a proper interpretation and to that extent, we think, gave its tacit approval of the Commission's conclusion referred to. In view of this, we are at a loss to understand the success with which the Commission's decision in *Ex Parte No. MC-2*, 28 M.C.C. 125, decided March 4, 1941, has been collaterally attacked in many courts. But such is the case and the time has come when another decision of this Court upon the same subject is required to put the matter finally at rest.

Reverting to the main point of emphasis, however, we suggest that no pertinent decision of the Commission more fully demonstrates that agency's conception of its jurisdiction as being applicable to *classes* of employees than that in *28 M.C.C. 125*. In that case, after full consideration of the evidence and the issues, it enumerated (pp. 138-139) the additional classes embraced within its jurisdiction: helpers, loaders and mechanics. (The class of drivers had already been established. 3 M.C.C. 665.)

Aside from the Commission's expertise insofar as the determination of which classes of employees of interstate motor carriers perform duties affecting safety of operation is concerned, contrast the consistency of its position in this matter with that of the Administrator of the Wage and Hour Division of the Department of Labor.

In his Interpretative Bulletin No. 9 (fourth revision, March, 1942) the Administrator held that a truck driver who spent in excess of 20 percent of his total work time in any one week in "non-exempt activities" could not be considered within the scope of the overtime exemption contained in Section 13(b)(1) of the Fair Labor Standards Act, "notwithstanding the fact that the Interstate Commerce Commission may regulate the hours of service of such driver under the Motor Carrier Act." 1943 Wage-

Hour Manual 189. However, in the fifth revision of his Bulletin No. 9, November, 1943, the Administrator has decided that motor carrier employees whose duties affect safety may be considered within the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act provided that they do not devote the "greater part" of any workweek at non-exempt activities. 1944-1945 WH Manual 523.

It is highly important that the authority of the Interstate Commerce Commission in the premises be understood. It is the Commission that possesses primary jurisdiction; it is the Commission that is responsible for the safe operation of motor vehicles and the rules and regulations governing the qualifications and hours of service of employees. U.S.C., Title 49, Sec. 304(a)(1), (2), (3). This is but a current illustration of the primary jurisdiction doctrine which was long ago recognized by this Court in the *Abilene Cotton Oil Case*, 204 U. S. 426 and which is still understood to be sound law.

II. Uniform Interpretation of the Exemption Provisions of Section 13(b)(1) of the Fair Labor Standards Act is Necessary But Presently Lacking.

In respondent's original brief, page 2, we stated the question as follows:

> Did the services rendered by the petitioner, as the same appear from the record in this case, substantially affect the safety of operation of the respondent's motor vehicles used by it as a common carrier of freight in interstate commerce?

Stated somewhat more broadly the question is whether or not an employee belonging to one of the classes which the Commission has indicated is subject to its safety jurisdiction need devote any specified quantum of his time in any work week to be exempt from the overtime provisions of the Fair Labor Standards Act for such week.

This Court has not heretofore passed specifically upon the question, although it has been raised in pleadings filed with it. Petitioner's brief, filed with this Court in *Richardson* v. *James Gibbons Co.*, No. 725, October Term, 1942, reads in part (pp. 8-9):

> Another aspect of this case relates to the duties performed by petitioner for respondent as a "Distributor-Operator," and the incidental work done by petitioner in driving the trucks. Petitioner operated the machinery of the "distributor" mounted on the truck chassis and at times acted as driver of the trucks. His work in operating the machinery of the "Distributor" was that of a technician; his work in driving the trucks, that of a Chauffeur. Was the incidental chauffeuring sufficient to take him without the protection and deprive him of the benefits of the Fair Labor Standards Act; petitioner holds that it was not. Petitioner suggests that the literal interpretation of the Fair Labor Standards Act of 1938, as indicated in the opinion of the District Court and the Circuit Court of Appeals, defeats the remedial purposes and intent of said Act, one of which was to insure employees, engaged in "commerce", overtime compensation for hours worked in excess of the legal maxima set forth in that statute.

This Court's decision in the *Richardson* case, embracing also *Southland Gasoline Company* v. *Bayley*, 319 U. S. 44, went only to the question of whether or not the Commission's power to regulate the qualifications and maximum hours of service of employees of private motor carriers whose duties affected safety of operation applied prior to May 1, 1940, the date on which the Commission first found need for such regulation. *Ex Parte No. MC-3*, 23 M.C.C. 1. But it seems reasonable to assume that the Court considered petitioner's position cited above to be without merit since no mention thereof appears in its decision.

The petitioner in the *Richardson* case presented the same argument before the Circuit Court of Appeals for the Fourth Circuit. That court made short shrift of the argument, saying (122 F. 2d 627, 628):

Nor are we impressed by Richardson's contention that "whatever driving of the truck, or trucks (upon which the Distributor Tank and Mechanism were mounted) that he did was but incidental to his main employment of 'Distributor-Operator'"; and that, therefore, he is within the provisions of the Fair Labor Standards Act, because "the Interstate Commerce Commission has not the power to establish for him, the plaintiff, qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935." See Rozmus v. Jesse F. Davis & Sons Co., 23 N.Y.S. 2d 821 (truck driver and delivery man, who also performed services about the yard where employer's business was conducted); Gavril v. Kraft Cheese Co., D. C., 42 F. Supp. 702 (driver-salesman of cheese and food products). The case of State of Maryland v. Depew, 175 Md. 274; 1 A. 2d 926, has a setting so different from the instant case that the decision there is not helpful to the plaintiff. And the fact that the contents of the truck or trucks driven by Richardson, were liquid asphalt products, which, counsel for Richardson admits in his brief, are "flammable and explosive," we think, brings his case even more clearly within the decision of the American Trucking Associations' case, supra.

Farther on in its opinion (pp. 629-630), the court had this to say as to the desirability of liberal construction of the Fair Labor Standards Act:

> We cordially agree with the opinion in the Bayley case that the Fair Labor Standards Act, as a remedial statute, must be liberally construed. This we developed at some length in Missel v. Overnight Motor Transportation Co., 4 Cir., 126 F. 2d 98. But salus populi suprema lex esto and we should be equally careful not to restrict unduly any federal statute which, in the interest of public safety, undertakes to clothe the Interstate Commerce Commission with power to encompass so worthy an end. The vast importance of the private carrier of goods by motor vehicle is too well known to require comment. Congress must have appreciated this. We think, accordingly, that Congress was pretty well convinced that the Interstate Com-

merce Commission would (as it did) make a finding of the necessity of regulating these carriers. Any other finding would have been little less than shocking to the American public.

That employees of all motor carriers, whether common, contract, or private, subject to the jurisdiction of the Interstate Commerce Commission for safety purposes, stand on an equal footing so far as the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act are concerned, has now been established beyond doubt. In the instant case, this Court is respectfully requested to determine, once and for all, precisely what that footing is in order that all lower courts, trial and appellate, may be in a position to interpret uniformly in the future the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The contrariety of judicial philosophy as set forth in the various opinions of the District and Circuit Courts which have passed upon this issue in one way or another necessitates a direct answer by this Court to the question posed.

A brief reference to a few of the many decisions arising out of the conflict between the Administrator's interpretation of the provisions of Section 204 of the Motor Carrier Act, 1935 (now Interstate Commerce Act, Part II), and that of the Commission will best illustrate the fact that uniformity of interpretation of the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act is an utter necessity if the question here involved is ever to be finally settled.

Despite the obvious fact that the Administrator has no authority to make legally binding interpretations of the exemption provisions in question, some of the court decisions dealing with this matter seem to accept his interpretation as gospel, although not in all instances specifically referring thereto.

In *Aulchick* v. *Transamerican Freight Lines, Inc.*, 46 F. Supp. 861, the United States District Court for the Eastern District of Michigan said (p. 865):

Therefore, we hold that for those weeks where plaintiffs devote a substantial part of their time to the type of work enumerated in (b)(c)(d)(f) and part of (a) italicized these plaintiffs are entitled to recover time and one-half for overtime as provided in the Fair Labor Standards Act. And in arriving at what is meant by "substantial" we must accept the Interpretative Bulletin No. 9 U. S. Department of Labor, Wages and Hours Division and the legal field letter dated May 23rd, 1941, sent out from the Office of the Solicitor of the Department of Labor in which it states that

"Any amount of work in excess of 20 percent of the total number of hours worked by the particular employee within a particular work week" brought the employee out of the Commission's jurisdiction.

United States v. American Trucking Associations, Inc., supra, is authority for the legal position that such "interpretations" though not conclusive are entitled to great weight. *Personally we do not believe that twenty percent is a "substantial" part of one hundred percent but the finding of the labor department is fortified by the decisions of our courts.* (Citing cases) (Emphasis ours)

We submit that the court, in the *Anuchiek* case, must have confused the meaning of this Court's decision in the *American Trucking Associations* case in arriving at its conclusion that "we must accept the Interpretative Bulletin No. 9 U. S. Department of Labor, etc." Further, we think it failed to differentiate, in giving weight to the interpretation of the Administrator, between those instances where the Fair Labor Standards Act is being interpreted generally and where the exemption provisions of Section 13(b)(1) of that Act (plainly delegating to the Interstate Commerce Commission the interpretative duty) are under consideration.

And in *Walling* v. *Gordons Transports*, 8 WHR 838, the United States District Court for the Western District of Tennessee gave full effect to the "fifty-one percent" interpretation of the Administrator, although not referring specifically to it. There the court said (p. 841):

> Even where a particular employee devotes a portion of his working time during particular workweeks to work which is exempt under Section 13(b)(1) of the Fair Labor Standards Act, the exemption will be inapplicable to such employee in any workweek in which the employee devotes the greater part of his time to work of a non-exempt character.

It seems clear that the trial court in the instant case gave effect to the Administrator's "fifty-one percent" interpretation. We quote from page 11 of the Transcript of Record herein:

> The court further finds that plaintiff's work to be performed, *or the major portion thereof*, for the period herein sued did not affect the safety of defendant's operations within the meaning of Section 16(b)(sic) of the Fair Labor Standards Act and is not exempt under and by virtue of the provisions of said Section 16(b)(sic) of the Fair Labor Standards Act of 1938. (Emphasis supplied.)

Adding to the confusion is a recent decision of the Circuit Court of Appeals for the Second Circuit which, while holding that the Administrator's "fifty-one percent" interpretation violates the plain language of Section 13(b)(1) of the Fair Labor Standards Act, goes on to arrive at its own independent conclusion that the motor carrier employees in question (drivers) were not subject to the Commission's power to regulate their qualifications and maximum hours of service because their activities in interstate transportation consumed only three hours' work per week. *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 107, decided August 17, 1945. Referring to the interpretation of the Administrator, the Court said (p. 111):

> The Administrator of the Wage and Hour division has defined the scope of the exemption in Section 13(b)(1) in a manner which conflicts with the ruling of the Commission. See Interpretative Bulletin No. 9 (October 1943). His interpretation was made for the guidance of those engaged in administering the Act under

his supervision and is, in short, that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption."

Perhaps this would be a desirable way to resolve the inevitable conflict in the jurisdiction of these two administrative agencies. The Interstate Commerce Commission is primarily concerned with the maintenance of safety in interstate and foreign commerce, and its restriction of the number of hours in which those so engaged may work in any one work week is obviously intended to prevent accidents due to fatigue, without regard to considerations of adequacy of compensation; while the Administrator of the Wage and Hour Division is primarily concerned with the elimination of substandard wages, regardless of the number of hours worked or the effect of fatigue upon the workers. *We think, however, that the plain language of § 13(b)(1) of the Fair Labor Standards Act cannot be construed so loosely as the Administrator construes it.* That section exempts from the provisions of § 7 of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." *There is nothing in the last-mentioned statute which limits the power of the Commission to regulate qualifications and maximum hours of work to those of employees who are engaged in interstate commerce for the greater part of their working time in any one work week. So to construe it would seriously impair the effectiveness of control over the safety of operation and would leave much interstate and foreign carriage by motor vehicle unregulated in that respect.* (Emphasis ours)

Needless to say, we are in complete agreement with that portion of the Court's opinion quoted above. However, the Court goes on to say:

> Nor need we so construe it in this instance. Proof that two employees worked only three hours a week in interstate transportation and that two employees made

> "some" and "occasional" deliveries to the warehouses of chain stores and worked the remaining time in the production of goods for commerce does not satisfy the requirement that the amount of time during which they are engaged in interstate commerce be substantial. This comparatively small amount of work was not enough to put the employee who performed it within the Commission's power of regulation and left them outside the exemption provided in § 13(b)(1) of the Fair Labor Standards Act. See Levinson v. Spector Motor Service, 389 Ill. 466, 59 N. E. 2d 817.

The last quoted portion of the opinion of the Circuit Court of Appeals for the Second Circuit overlooks entirely, it seems to us, the obvious purpose of providing exemption from the overtime provisions of the Fair Labor Standards Act of "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." Congress, in enacting the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act, was not attempting to promote a guessing game between the Commission, the courts and the Administrator of the Wage and Hour Division. It was simply recognizing the obvious fact that the mere quantum of time is not a proper yardstick by which to measure an employee's contribution to safety. It is conceivable, and experience has demonstrated that even a few moments of intelligent, thoughtful and properly supervised planning and direction may exert an influence upon safety of operation far out of proportion to the amount of time consumed in such supervision and may very well spell the difference between life and death. We, therefore, respectfully submit that the true test of whether or not a man is within that class of employees whose activities substantially affect safety of operations is: "What does he do?"; not "How long does it take him to do it?" This seems to be the ground upon which the Appellate Court of Illinois held petitioner herein to be subject to the safety jurisdiction

of the Commission and exempt from the overtime requirements of the Fair Labor Standards Act. As pointed out in the Commission's brief (p. 28), Congress, in delegating to the Commission the authority to regulate the qualifications and maximum hours of employees of interstate motor carriers whose duties affect safety of operation, intended a practical application of such authority.

If the courts are free to ignore the Commission's findings of fact in *Ex Parte No. MC-2, supra,* and to arrive at their own independent conclusions with respect to whether or not a specified motor carrier employee is subject to the Commission's authority to regulate his qualifications and maximum hours of service, we may indeed expect a varied picture in the different judicial circuits with respect to what constitutes a "substantial" amount of time sufficient to render an employee subject to the jurisdiction of the Commission. It should be noted that the Court of Appeals for the Second Circuit also said in the *Comet Carrier* case (p. 111):

> The trial court held, relying upon Ex Parte No. MC-3, 23 M. C. C. 1, 39, that safety employees of the defendant engaged at least one day a week in carriage across state lines were exempt for that week. Whether or not that was a substantial amount of work would, of course, depend upon the extent of work thus done and *at least one day's work in any one week could reasonably be considered substantial.* (Emphasis ours)

Thus it will be seen that the Second Circuit Court of Appeals considers one day's work affecting safety of operation in any one workweek as sufficient to subject an employee of an interstate motor carrier to the safety jurisdiction of the Interstate Commerce Commission and exempt him from the overtime provisions of the Fair Labor Standards Act. If this position is tenable, then every other Circuit Court is free to arrive at a different conclusion as to what constitutes sufficient working time in activities affecting safety of operation to place a motor carrier em-

ployee under the safety jurisdiction of the Commission. Again we say that the Commission is the agency to which Congress has delegated the duty (both under Section 204 of the Motor Carrier Act and Section 13(b)(1) of the Fair Labor Standards Act) in the first instance, of determining which employees of interstate motor carriers perform duties affecting safety of operation. The Commission has performed that duty and has specified certain classes of employees as being engaged in such activities.

In upholding the Commission's interpretation that its authority to regulate qualifications and maximum hours of service of motor carrier employees applied only to those employees whose duties affected safety of operation, this Court (by a five to four decision) overruled the decision of a three-judge statutory court holding that *all* employees of interstate motor carriers were subject to the Commission's jurisdiction to regulate their qualifications and maximum hours of service. *American Trucking Associations, Inc.* v. *United States*, 31 F. Supp. 35. Had that Court's decision remained the law, motor carrier employers would not have been required to pay overtime to any of their employees by virtue of the Fair Labor Standards Act. Thus they would have been on a par with their chief competitors, the railroads, who are not required by the Wage-Hour law to comply with the overtime provisions of Section 7 of the Act.

Following the Commission's decision in *Ex Parte, No. MC-2, supra*, the motor carrier industry and the respondent here accepted at face value the Commission's findings of fact that only drivers, drivers' helpers, loaders and mechanics, as a class, perform duties affecting safety of operation and are consequently exempt from the overtime provisions of Section 13(b)(1). If the Administrator of the Wage and Hour Division, while stating in his Interpretative Bulletin No. 9 that it is not intended to be binding, may go before the courts seeking injunctions against motor carriers in cases which constitute collateral attacks upon the Commission's

decision in *Ex Parte No. MC-2, supra*, what is to prevent those same motor carriers from seeking court decisions holding, for example, that a dispatcher "spends a substantial amount of his time in duties affecting safety of operation" and is therefore exempt from the overtime provisions of the Fair Labor Standards Act? Motor carriers, by and large, have attempted to live up to the provisions of the Fair Labor Standards Act in the light of the Commission's decision in *Ex Parte No. MC-2*. Their task has been made extremely difficult if not in fact impossible, by the Administrator's constant effort to offset, indirectly, the effect of the Commission's decision therein.

III. The Commission's Decision May Not Be Collaterally Attacked but is Subject to Proper Review.

The principle that judgments of administrative agencies as to matters of fact may not be collaterally attacked has been long established. In *St. Louis Smelting & Refining Co.* v. *Kemp*, 104 U. S. 636, 26 L. Ed. 875, decided March 6, 1882, this Court said:

> In the course of their duty, the officers of that [Land] Department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.

In *Hanson* v. *Hoffman*, 113 F. 2d 780, decided May 24, 1940, the Circuit Court of Appeals for the Tenth Circuit applied the principle of the *St. Louis Smelting Co.* case, supra, in holding that legal title to property of an Indian

testator, having vested through administrative action of the Secretary of the Interior in approving the will, could not be collaterally attacked.

That actions by employees of interstate motor carriers or the Wage and Hour Administrator, whereby the courts are asked to rule that employees (of a class which the Commission has declared subject to its safety jurisdiction) are not exempt from the overtime provisions of the Fair Labor Standards Act constitute collateral attacks upon the Commission's findings of fact in *Ex Parte No. MC-2, supra*, seems too plain to labor. We are at a loss, especially, to understand the reluctance on the part of the Administrator to make a *direct* attack upon the Commission's findings, if, as his actions so clearly indicate, he believes them to be erroneous.

As indicated earlier herein the diversity of opinion among the various lower courts has brought about a situation in which an interstate motor carrier cannot ascertain his rights and obligations. Respondent finds itself in just this position. Accordingly both practical and legal considerations force us to differ with what we construe to be the Commission's position with regard to its decision in *Ex Parte No. MC-2* as evidenced by its brief amicus. Briefly, it would seem to be that the Commission's findings of fact therein with respect to which classes of employees of interstate motor carriers perform duties affecting safety of operation are correct, but that the courts remain free to ignore them in any case involving the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act, and to substitute their judgment for that of the Commission in arriving at their independent conclusions as to whether or not a certain employee performs duties affecting safety of operation.

The following statement appears at page 4 of the Commission's brief:

> It is here further mentioned that while, in the above case [United States v. American Trucking Associa-

> tions, Inc.], the Court's opinion states that the interpretation and meaning which the Commission and also the Wage and Hour Division of the Department of Labor had placed on subparagraphs (1) and (2) of section 204 (a) should be accorded great weight (p. 549), the opinion also makes plain (p. 544) that, except for the rule of according great weight to the views of administrative bodies, such "interpretation of the meaning of statutes, as applied to judicial controversies, is exclusively a judicial function."

We respectfully submit that it is precisely because some of the courts have ignored the Commission's findings of fact in *Ex Parte No. MC-2, supra*, and substituted their opinion for the expert judgment of the Commission with respect to which activities of motor carrier employees affect safety of operation that this Court is now called upon to settle the conflict which has inevitably arisen.

The function of the courts in cases wherein the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act is pleaded as a defense to an action brought under that Act is, we suggest, rather limited. We think in such cases the courts' task is confined to a determination of whether or not the duties of the employee are such as to place him within the rather broad sweep of the language used by the Commission in its description of the classes of employees subject to its safety jurisdiction. Applying this test to the instant case, we note the following language of the Commission in *Ex Parte No. MC-2*, 28 M. C. C. 125, 133-134:

> The practice of small carriers in regard to the employment of loaders differs from that of the large carriers. The drivers employed by the small carriers load and unload the motor vehicles. This situation presents no problem for decision here, because as these men are drivers, we have, in our prior decisions, found them subject to our jurisdiction.
>
> The large carriers, however, and particularly those who have important operations from terminal to termi-

nal, employ men *variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between the vehicles and the warehouse.* (Emphasis supplied)

It seems abundantly clear that the Commission, in defining loaders, intended to encompass within its definition all those dock employees of interstate motor carriers subject to its jurisdiction whose duties were such as to require their inclusion as a member of the "gang" needed to load and unload motor vehicles at the terminals of the carriers. And we believe the decision of the Illinois Appellate Court in the instant case, 56 N. E. 2d 142, gives recognition to this theory.

As we read the Commission's brief, it proceeds on the assumption that its findings of fact in *Ex Parte No. MC-2, supra*, to the effect that certain classes of employees of interstate motor carriers perform duties affecting safety of operation, belong in the same category as its earlier interpretation of the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act, made prior to and affirmed by the decision of this Court in the *American Trucking Associations* case, supra. We think they are not comparable at all. When the Commission early decided that its jurisdiction to regulate the qualifications and maximum hours of service of employees of interstate motor carriers extended only to those employees whose duties affected safety of operation, it was, without question, interpreting the statute. But when later, after exhaustive hearings, it found, as a fact, that drivers, drivers' helpers, loaders and mechanics employed by interstate motor carriers performed duties affecting safety of operation, it was by no means engaged in construing the statute, though what it did was done at the direction of the statute. Its previous construction of the statute had already been upheld by this Court, *United States* v. *American Trucking Associations, Inc., supra.* This being so, it became neces-

sary for the Commission, through its administrative processes, to exercise the authority delegated by Congress and determine, as a fact, which employees of interstate motor carriers perform duties affecting the safety of operation of vehicles in interstate or foreign commerce.

Mr. Justice Douglas, dissenting in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, said (p. 795):

> . . . Congress has given the Interstate Commerce Commission broad powers of regulation over interstate carriers. The Commission is the national agency which has been entrusted with the task of promoting a safe, adequate, efficient, and economical transportation service. It is the expert on this subject. . . .

It was in the exercise of its safety jurisdiction that the Commission, subsequent to this Court's decision in the *American Trucking Associations* case, reopened *Ex Parte No. MC-2* for the purpose of determining, as a fact, which classes of employees of interstate motor carriers, in addition to drivers, perform duties affecting safety of operation. And the mere fact that the Commission's findings of fact set forth therein would, if accepted by the courts, have the effect of exempting from the overtime provisions of the Fair Labor Standards Act all employees of interstate motor carriers whose duties are such as to place them in one of the exempt categories cannot change the nature of the administrative proceeding undertaken by the Commission from a purely fact-finding effort to the interpretation of a statute. Insofar as the Commission's conclusions of law enumerated in *Ex Parte No. MC-2* are concerned, they constitute merely a restatement of its previous interpretation of the statute, approved by this Court in the *American Trucking Associations* case, supra.

The question of whether or not the latest decision of the Commission in *Ex Parte No. MC-2, supra*, can be considered in effect a reviewable order is a perplexing one. The Commission, after pointing out that its safety jurisdiction extends to classes of employees whom it designates

"mechanics," "loaders," and "helpers," in addition to drivers for whom qualifications and maximum hours of service had already been established,[1] closed its opinion with these words: "No order is necessary at this time."

This Court, in distinguishing between orders of the Commission which are reviewable and those which are not, said in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130-131:

> The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; *which does not determine any right or obligation.*" United States v. Los Angeles R. R., 273 U. S. 299, 309, 310, 47 S. Ct 413, 414, 71 L. Ed. 651. (Emphasis ours)

Although, as previously stated, the Commission issued no formal order in its latest decision in *Ex Parte No. MC-2, supra*, the first paragraph of its report therein states, among other things:

> . . . Before the Wage and Hour Division of the Department of Labor, which administers the provisions of the Fair Labor Standards Act, or the common, contract, and private carriers can well determine which employees are subject to the provisions of section 7 of that act, they must know the extent of our jurisdiction.

From this beginning, the Commission's report went on to state, clearly and unequivocally, that its jurisdiction to

[1] *Maximum Hours of Service of Motor Carrier Employees*, 11 M. C. C. 203; *Motor Carrier Safety Regulations—Private Carriers*, 23 M. C. C. 1.

regulate the qualifications and maximum hours of service of employees of interstate motor carriers extended, in addition to drivers, to those classes of employees whom it designated as "mechanics," "loaders," and "helpers."

It is clear that the Commission's report in *Ex Parte No. MC-2, supra*, did determine the right of all employees of interstate motor carriers, with the exception of the four exempt classes, to enjoy the benefits of the overtime provisions of the Fair Labor Standards Act, as well as the right of motor carrier employers to consider those employees falling within the four specified exempt categories as being exempted from these same overtime provisions.

It is noted that the administrative proceeding by the Commission which led eventually to this Court's decision in *United States* v. *American Trucking Associations*, 310 U. S. 534, did not result in the issuance of a formal order by the Commission. *Ex Parte No. MC-28*, 13 M.C.C. 481. In its report therein the Commission merely set forth its conclusion of law that its jurisdiction to regulate qualifications and hours of service of employees was limited to those whose duties affected safety of operation, and discontinued the proceeding. Following this, the aggrieved motor carriers filed suit for a mandatory injunction to compel the Commission to consider their petition for the establishment of reasonable requirements with respect to qualifications and maximum hours of service for *all* employees of common and contract motor carriers. The statutory court which heard the case treated the Commission's report just as though a formal order had been entered. In its opinion in *American Trucking Associations, Inc.* v. *United States*, 31 F. Supp. 35, it said (pp. 36-37):

> Jurisdiction of the court is conceded. Sec. 205(h) of the Motor Carrier Act [now Sec. 205(g), Interstate Commerce Act, Part II]; Interstate Commerce Comm. v. United States ex rel. Humboldt Steamship Co., 224 U. S. 474, 32 S. Ct. 556, 56 L. Ed. 849; United States ex rel. Louisville Cement Co. v. Interstate Commerce Comm., 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914;

United States ex rel. Kansas City So. Ry. v. Interstate Commerce Comm., 252 U. S. 178, 40 S. Ct. 187, 64 L. Ed. 517.

This Court in *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, had occasion to pass upon the effect of a determination by the Commission, for the purposes of the Railway Labor Act, 45 U.S.C. § 151 et seq., that the railroad was not an interurban electric railway, and of the scope of judicial review of that determination. There it said (pp. 182-183):

> We have held that the determination of the Commission is not an "*order*" reviewable under the Urgent Deficiencies Act of October 22, 1913. Shannahan v. United States, supra. But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the Shannahan Case, we had no occasion there to consider. . . . The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce.

There is a striking similarity between the situation which prevails when the Commission determines, for purposes of the Railway Labor Act, whether or not a railroad is an interurban electric railway, and the determination of the Commission, in *Ex Parte No. MC-2, supra.* In each instance, the determination of the Commission in turn ascertains the extent to which another statute than the Interstate Commerce Act applies to employees of the carriers involved, but in the present case the Commission acts pursuant to specific mandate of the Interstate Commerce Act (49 U.S.C. Sec. 304(a)). In each case also the determi-

nation of the Commission is part of a regulatory scheme. And just as the Commission's determination, if validly made, determines the question of whether or not the carrier is subject to the requirements of the Railway Labor Act, to the same extent it should determine the extent to which motor carrier employers are subject to the hours provisions of the Fair Labor Standards Act. The authority in the present instance, however, flows from the very law creating the Commission, and at the same time furnishes the legal basis for the promulgation of its safety regulations.

This Court, in *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 27 S. Ct. 700, 704, said:

> And the findings of the Commission are made by law prima facie true. This court has ascribed to them the strength due to the judgment of a tribunal appointed by law and informed by experience. (Citing cases). And in any special case of conflicting evidence, a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying. . . .

In *Board of Trade of Kansas City, Mo.* v. *United States*, 314 U. S. 534, this Court said:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.

The statement of the Court with respect to the rate making powers of the Commission would seem to be equally applicable to the Commission's safety powers. The Commission's administrative processes must be fluid and chang-

ing if it is to continue to discharge its duty, delegated by Congress, to promote safety of operation of motor trucks on the nation's highways.

The Commission's latest decision in *Ex Parte No. MC-2, supra*, has never been the subject of direct attack in the courts. While we agree with the statement in the Commission's brief (pp. 24-25) that neither the Commission's nor the Wage-Hour Administrator's determination of the status of employees is in any sense final except as sustained by the courts, we respectfully suggest that judicial review of the determinations of the Commission in *Ex Parte No. MC-2* may not be forever postponed while the courts continue to entertain actions by motor carrier employees and the Wage and Hour Administrator which collaterally attack the correctness of those same determinations.

IV. The Commission's Power to Regulate Qualifications and Maximum Hours of Service of Specified Classes of Motor Carrier Employees Cannot Evaporate Through Lack of Administrative Exercise.

This Court, in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, said (p. 352):

> Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise.

Cf. *United States* v. *American Union Transport*, — U. S. —, 66 S. Ct. 664, 653, footnote 18.

At the original oral argument in the instant case, reference was made to the fact that the Commission has, up to the present time, issued regulations governing qualifications and maximum hours of service applicable only to drivers of motor vehicles operating in interstate commerce. It was there argued that a motor carrier employee whose qualifications and maximum hours of service have not been regulated by the Commission should not be denied the benefit of the overtime provisions of the Fair Labor Standards

Act. We believe this Court fully answered that argument in the *Bayley* case, supra, and we need do no more than mention it here.

During the last session of Congress a very determined effort was made to enact legislation which would have had the effect of validating an interpretation of the Administrator of the Wage and Hour Division made prior to this Court's decision in the *Bayley* case, as well as his present "fifty-one per cent" interpretation of the exemption provisions of Section 13(b)(1) of the Fair Labor Standards Act. It will be recalled that one of the Administrator's early issues of Interpretative Bulletin No. 9 took the position that, until the Commission determined "that a particular class of employees of common and contract motor carriers other than drivers affect the safety of operation of motor vehicles" employees other than drivers could not be considered exempt from the overtime provisions of the Fair Labor Standards Act. *Interpretative Bulletin No. 9, first revision*, July, 1939. In that same bulletin the Administrator held that until a finding of need for regulation of private carriers had been made by the Commission, no employees of private carriers could be considered exempt from the overtime provisions of the Fair Labor Standards Act. 1940 WH Man. 169-170.

S. 1349, introduced August 1, 1945, (91 *Cong. Rec.* 8210) provided, among other things, for the amendment of Section 13(b)(1) of the Fair Labor Standards Act, to read as follows:

> The provisions of section 7 [overtime] shall not apply with respect to (1) any employee who during the greater part of any workweek is engaged in work with respect to which the Interstate Commerce Commission has established qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . .

As reported by the Senate Committee on Education and Labor March 5, 1946 (92 *Cong. Rec.* 1942) S. 1349 contained

the proposed amendment of Section 13(b)(1) of the Fair Labor Standards Act referred to above. *Senate Report No. 1012*, 79th Cong., 2d Sess. However, the provision in question was eliminated from S. 1349 on the Senate floor (92 *Cong. Rec.* 3247) prior to passage of the bill by the Senate on April 5, 1946. 92 *Cong. Rec.* 3267.

The proposed amendment to Section 13(b)(1) of the Fair Labor Standards Act which would have placed the stamp of Congressional approval upon the interpretations of the Administrator referred to has fallen by the legislative wayside, but the conflict between the Administrator's Interpretative Bulletin No. 9 and the Commission's decision in *Ex Parte No. MC-2, supra*, still remains.

Conclusion.

Summed up, we think it clear that:

Congress, in enacting the Motor Carrier Act, 1935, by Section 204(a)(1) thereof authorized the Commission to "establish reasonable requirements" with respect to qualifications and maximum hours of service of employees of interstate motor carriers, and that power has never been withdrawn.

Congress, in enacting the Fair Labor Standards Act of 1938, chose to continue to invest the expert body, the Commission, with the authority referred to above.

The Commission's interpretation to the effect that its jurisdiction to regulate the qualifications and maximum hours of service of motor carrier employees applies only to such employees whose duties affect safety of operation was sustained by this Court in *United States* v. *American Trucking Associations, Inc., supra.* Further, the Commission's previous indication that its jurisdiction, for safety purposes, extended to classes of employees engaged in duties affecting safety received the tacit approval of this Court in the same case.

The Commission's latest decision in *Ex Parte No. MC-2*, 28 M.C.C. 125, was purely a fact-finding proceeding, neces-

sary to determine just which classes of employees of motor carriers perform duties affecting safety of operation. Insofar as its conclusions of law therein are concerned, they are but a reiteration of those previously approved by this Court in the *American Trucking Associations* case.

The decision of the Commission in *Ex Parte No. MC-2, supra,* was rendered after a full hearing participated in by employee representatives, employers and other interested parties, is supported by substantial evidence, and the courts should not countenance collateral attacks upon it.

The facts of this case show that Petitioner Levinson was at all times either a loader or foreman in charge of all men on the dock loading and unloading, or a checker, which in respondent's operations is merely another name for a supervisor of loaders or chief loader.

Levinson was a member of a class whose duties affect the safety of operation of motor vehicles in interstate or foreign commerce, was included within the Commission's decision in 28 M.C.C. 125, and he and others falling within the classes enumerated by the Commission are not subject to the overtime provisions of the Fair Labor Standards Act.

Respectfully submitted,

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